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IN THE

Supreme Court of the United States

October Term, 1956

MINERAL HOLDING TRUST OF ST. PAUL, MINNESOTA, R. B. WHERRY AND C. A. GREEN, *Petitioners*,

v.

ALUMINUM COMPANY OF AMERICA, CROWN CENTRAL PETROLEUM CORPORATION, ET AL., *Respondents*

Reply to Petition for Writ of Certiorari to the Supreme Court of Texas

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Reply to Petition for Writ of Certiorari to the Supreme Court of Texas

To the Honorable Supreme Court of the United States:

Now come the ALUMINUM COMPANY OF AMERICA and CROWN CENTRAL PETROLEUM CORPORATION and file this their Reply to the Petition for Writ of Certiorari on file. For the purpose of brevity, these Respondents will be known as Alcoa.

Questions Presented by the Reply:

(1) Whether the principles established by this Court in the case of *Miedreich v. Lauenstein*, 232 U.S. 236, are

not controlling in respect of the rights of Alcoa, who was not a party to the institution of tax judgment and sale but bought in reliance upon the integrity thereof.

(2) Whether the Statutes of Texas, adopted under the direction of the Constitution of Texas, vesting in the Assessor power to list and value real property when the owner fails to do so, render valid the valuation places thereon by the Assessor.

(3) Whether the rule announced in *Ballard v. Hunter*, 204 U.S. 241, does not settle the question of due notice in light of the holding of the Texas Supreme Court that citation by publication was sufficient under its rule and that Due Process does not necessarily require personal citation to the nonresidents.

(4) Whether, although personal service may be required normally, failure to effect such under the peculiar facts of this case was not a denial of Due Process.

(5) Whether the Petitioners Wherry and Green are in position to raise the constitutional questions posed. They were not parties to the tax suit; had no property taken; their recovery will not be helpful of the Trust, whose property allegedly was taken; in terms of substantial justice their claims against Alcoa were found wanting.

Statement

I.

In the Appendix to the Petition will be found extended Findings of Fact by the Trial Judge (pp. 61-80). We believe, however, that summaries of portions thereof will be advantageous, particularly in respect of any issue of

alleged want of Due Process, since such to some extent presents a practical problem in light of the peculiar facts of the case.

II.

From its very inception, this controversy from a practical standpoint has been a controversy between Wherry and Green on the one hand and Alcoa on the other. Rights of relief against Stovall and Appling were clear under the Trial Court's fact findings.

Alcoa acquired an oil, gas and mineral lease dated February 12, 1952, from Stovall and Appling, they alone being the Respondents who are charged with having been guilty of wrongdoing in connection with the institution of the tax suit. The lease provides for a 1/6 royalty, has a primary term of 6 years (within which production must be had or the lease will terminate), and provides for an annual delay rental of $2.50 per acre. On the other hand, the lease from Wherry and Green, taken from the Trust on September 29, 1953, provides for only a 1/8 royalty, contains no duty to pay delay rentals, and has a primary term of 10 years.

Wherry and Green paid $5,000, in the circumstances hereinafter mentioned, for this lease and for 1/2 of the 1/2 mineral interest claimed by the Trust and an equivalent interest in the royalties and rentals under any "valid" lease.[1]

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[1] In this respect they purposely put themselves in a position to claim the rentals and royalties under the Alcoa lease should it be sustained; i.e., to take advantage thereof if they could not defeat it.

It will thus be seen that the Trust will benefit rather than lose should the lease of Alcoa be established. This was known to Wherry and Green at the time of such acquisition, but was not known to the Trust, which did not know of the 1/6th royalty in Alcoa's lease. The difference between a royalty of 1/6 and a royalty of 1/8 is substantial in the event of production, to say nothing of other benefits even if production be not had. Wherry and Green, they admit, took a chance of title and have no claim back against the Trust (S.F. p. 389). All rights under the Alcoa lease, the rights of reverter and as well the right to 1/2 the bonus received from Alcoa and Crown, Stovall and Appling held as constructive trustees in light of their claimed wrongdoing; and this whether the judgment and sale be valid or void or whether the judgment be set aside or not.

III.

Admittedly, Stovall and Appling owned the surface and 1/2 the minerals. Their title to the remaining 1/2 rests upon a tax judgment from suit filed on October 5, 1950, with judgment entered January 17, 1951. Citation by publication was published in the County Seat newspaper of Jackson County, Texas, once a week for 4 weeks, the first publication being on October 12, 1950.[2]

It was addressed as follows:

[2] "TO: Mineral Holding Trust, a private corporation, the unknown owners, stockholders, assignees and legal representatives of Mineral Holding Trust, a private corporation, their unknown legal representatives, Mineral Holding Trust, a partnership and/or unincorporated concern, the unknown owners, partners, assignees and legal representatives of Mineral Holding Trust, a partnership and/or unincorporated concern, their unknown heirs and legal representatives, the unknown owner or owners of the hereinafter described real property, their unknown heirs and legal representatives, owning, having or claiming any interest or lien in the property hereinafter described * * *."

The judgment is in rem as against the property only. The order of sale was issued February 8, 1951, executed April 3, 1951, after a prior publication of the notice of sale in the same County Seat paper for a period of more than 20 days before the date of sale. Alcoa had nothing to do with the tax suit and knew nothing of the property or of Stovall and Appling at that time. The Trial Court found as a fact that Alcoa properly relied on the tax sale. Their initial interest in the property arose from the fact that through geophysical work in the late summer and early fall of 1951 they found evidence of a likely structure in the general area. They then set about to acquire a wildcat block of some 6,000 acres, the 640 acres here involved being along the south edge thereof.[3]

An initial well was drilled on the lease by Alcoa in the fall of 1953 and completed in October, 1953, at a depth of about 9,000 feet and at a cost of approximately $150,000. The well was located within 3/4 to 1 mile of the nearest point of the land in suit. There had been necessary delay incident to assembling so large a block.

Wherry and Green (not previously interested in the area) learned of a probable "show" in the well about September, 1953, and immediately sent representatives to Jackson County (among them a man who had spent some years in a Tax Collector's and Assessor's office) to search out the names of nonresidents in an effort to contact them. They there learned of the tax suit and of the Alcoa

[3] The bonus paid for this lease sheds no light on bonus values at the time of the institution of the tax suit or the tax sale. No lease or oil activity is shown to have occurred from 1922 up to the time of the geophysical work of Alcoa. The bonus value was created only when it was made known that Alcoa had done this geophysical work.

lease. One of their men (then in the Kansas City area seeking to contact non-resident owners) was sent to St. Paul. There in some fashion he got in touch with Mrs. Cocklin (she owned 600 of the 663 certificates of interest in the Trust), who referred him to Mr. Fred Dowd, an attorney. Dowd being absent from the city, the business of the agent was not disclosed. Later, when it was more certain that production had been encountered, Wherry, learning that Dowd could be contacted in New York, flew there; and, being by Dowd referred to Mr. Beddall, in turn flew to St. Paul, where he met Beddall, who was an attorney and spokesman for the Trust and was the attorney who prepared the original Trust Instrument. At that time Beddall thought only two of the original seven Trustees were living; namely, Beddall and Richardson. Somewhat later one other turned up in Florida, a Mr. Boecher.

The agreement to lease and sell were oral and not enforcible under the Statute of Frauds. The lease was attached to a 15-day sight draft drawn upon, and subsequently paid by, Wherry and Green. This 15-day interim gave them further time (whatever their motive was) within which to "play" the well. The well came in, and this lawsuit ensued.[4] (See *Findings*, particularly XXIX and XXXIII.)

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[4] In the transactions between Wherry and the Trust no mention was made of the Aluminum Company, according to the testimony of Mr. Beddall (S.F. 108); and, according to Mr. Wherry, he purposely did not mention it. Wherry also was of the following view as expressed by him: "I never saw a tax sale almost that could not be set aside. I would buy almost anything under one, with one." (S.F. 388) Wherry and Green immediately characterized the value of their $5,000 purchase as over $100,000. (See S.F. p. 388)

The fact of the making of a well, of which Wherry and Green

IV.

The suit was characterized as, "A Bill of Review To Set Aside the Order of Sale, Sale, and Tax Deed Based upon Tax Foreclosure." It contains multitudinous alleged reasons why the relief should be granted, including charges of fraud against Stovall and Appling and also the allegation that Alcoa took with knowledge. The prayer consists of various requests for declaration based upon which there should be a removal of cloud from title (Prayer, paragraph 10, Tr. p. 26).

While it attacks the sale and judgment, it does not make the State, plaintiff in the tax suit, a party to the suit based upon the allegation in paragraph XXXI, Tr. p. 22. These allegations are to the effect that, the taxing agencies (County and State) having received the money paid at the tax sale, such operated to have paid all the taxes due.

As to the method pursued in assessing taxes, see Finding XVIII, page 66, and Finding XXVIII, page 71. Summarized, the Tax Assessor, purporting to exercise the authority conferred by the Constitution and Statutes, back assessed the property, valuing it at $2 per acre. (See Exhibit 29, p. 141, S.F. Vol. 2.) This was the valuation for nonproducing minerals fixed by the Board of Equalization. It was less than the actual value of the mineral interest, according to Mr. Wherry, who valued it at $50.00 an acre. It is the same valuation placed thereon by Cocklin on the

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either had actual knowledge or what they regarded to be assurance when they paid the draft, made the royalty become worth approximately $200 an acre according to the testimony (S.F. 310)—$32,000 for the 160 acre royalty deed. This aside from the value attributed to the oil and gas lease, which is of greater value according to Wherry (S.F. 441).

last payment of taxes for the year 1940. No renditions or payments of taxes were made by the Trust after the 1940 payment, which was paid in 1941. Findings as to what was paid and by whom are set out in Finding XXV.

As to the facts dealing with the question of whether the Trust could have been located for personal service, same are complex and will be dealt with in the Argument on that subject.

Argument

I.

Inasmuch as the holdings of the Texas Supreme Court foreclose all issues within its final jurisdiction, such as the "returned delinquent" theory, including a construction of the Texas Statutes and ordinary factual situations, we do not undertake to reply to much that is contained in the Petition. Undoubtedly the District Court of Jackson County had jurisdiction both under the Constitution and Statutes.[5]

II.

That there is no want of Due Process in recognizing the title of Alcoa is established, we submit, in view of the holding of this Court, and the underlying philosophy thereof, in the case of *Miedreich v. Lauenstein*, 232 U.S. 236.

We amplify this to a certain extent in light of the rule prevailing in Texas and the historical background thereof.

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[5] **Brown v. Bonougli**, 111 Tex. 275; **State Mortgage Co. v. Ludwig**, 121 Tex. 268; **Mexia Independent School Dist. v. City of Mexia**, 134 Tex. 95.

The Texas view is akin to that which apparently prevailed in Indiana, and most of it was established by the early decisions of this Court. Included in these is the case of *Grignon's Lessees v. Astor*, 2 Howard 343, which has been relied upon in Texas a number of times.

Under this rule in Texas[6] a judgment which does not affirmatively bear evidence of no jurisdiction must be respected until set aside. Indeed, this appears to some extent to be fundamental in light of the dignity which must necessarily be attached to judgments of courts of general jurisdiction.

In *Miedreich v. Lauenstein*, under the law of Indiana a substitute remedy was given against the sheriff's bond and regarded as adequate. Generally speaking, all those who abuse the use of processes are held responsible to the injured defendant. Under the law of Texas a remedy is given even as against a purchaser for value when the circumstances direct it. A leading case on this subject is *Harrison v. Sharpe*, 210 S.W. 721. A purchaser for value and without notice may even still be deemed a constructive trustee by insisting on his purchase if the relative loss of the defendant is out of due proportion in relation to the loss of the purchaser, as held in that case.

Petitioners say that the judgment is void; but, if not void on its face, must not there be a judicial determination of such? And in such a judicial determination, if the asserted rights of one who relies upon the solemn adjudica-

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[6] See **Murchison v. White**, 54 Tex. 78; **Crawford v. McDonald**, 88 Tex. 626. These cases have been followed in a number of instances. Purchasers are protected. **Jones v. Sun Oil Co.**, 107 Tex. 353, and cases cited; **Snell v. Knowles**, 87 S.W. 2d 871 (Writ of Error Refused).

tion of a court of general jurisdiction are not respected, where exists the policy which respects judgment?[7]

Clearly, there must be some balancing here as between the respective rights of the parties, and how may they be better balanced than as determined in Texas in a proceeding in which the respective equities of the parties may be weighed? Petitioners recognized this in the filing of their Bill, through which they appealed to a court of equity and offered to do equity, but deny such in their Petition here presented.

It must not be forgotten that actually a purchaser rightly looks at the judgment collaterally; that is to say, not with the view of questioning its validity but in reliance upon its validity. Such being the situation, he should be so protected unless upon showing of equitable considerations the contrary appears.

Petitioners say all this is obviated by a matter of procedure, namely, by bringing a direct action instead of attacking collaterally. Certainly, matters of such substantial quality do not depend upon the mere matter of procedure. Their substance must be looked into in order that the Court have full power to adjust the equities of the parties litigant.

The sanctity of a citation-by-publication judgment in Texas is fortified by Rule 109 of the *Rules of Civil Procedure,* which requires that the trial judge inquire into the sufficiency of the diligence exercised. (Reply Appendix, p. 27.) The Court here, in appointing the attorney ad litem to represent the defendants, presumably looked into

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[7] See reference to "invincible presumption." **Crescent City Live Stock Co. v. Butcher's Union,** 120 U.S. 160.

such sufficiency. At any rate, a purchaser rightly must so assume. Article 3818 dealing with execution sales generally, *Constitution*, Article VIII, Sec. 13, and Article 7330, dealing with tax sales, and Article 3323 dealing with probate orders fully recognize the right of reliance. (Reply Appendix, p. 55.)

Apparently the *Restatement of Judgments* adopts the view of *Miedreich v. Lauenstein*. See Section 117, particularly Subdivision (c), pages 567-568, and reference back to page 73, Section 12.

III.

We deal next with the question of the validity of the assessment.

The Supreme Court of Texas held it irregular but valid. The views of that Court, familiar with its Constitution and Statutes, ought to carry some weight even though there may be a duty upon this Court to make an independent inquiry when Due Process is involved.

We here briefly state the constitutional and statutory provisions, which are quoted and referred to either in the Appendix to the Petition or in the Appendix to this Reply.

The constitutional provisions are under Article VIII of the existing *Constitution of Texas*, adopted in 1876.

Section 1 requires that all property shall be taxed. Section 15 fixes a lien on landed property in respect of each annual levy. Section 11 provides that property "shall be assessed in the County where situated, and:

"All lands and other property not rendered for taxa-

tion by the owner thereof shall be assessed at its fair value by the proper officer."

Section 14 creates the office of Assessor and Collector as a constitutional officer who shall perform such duties as may be prescribed by the Legislature. (Reply, App. p. 26.)

The Statutes expressly enjoin the duty on the part of the owner of real estate (which includes the severed mineral estates) to list or render his property. (See copy of Statutes, Reply, App. 30-31.) He is charged with this duty in respect of the obligation he owes to help support the government. The property shall be rendered by him or his agent. In rendering, he is authorized to fix the value, which may or may not be accepted either by the Assessor or the Board of Equalization. However, if he fixes the value he is in no position to complain of its adoption. The value fixed by his agent is equally binding upon him.

Of necessity there must be some law dealing with the failure of one to render his property.

Article 7172 provides that the lien shall not be affected by the failure to assess in any given year but that the Assessor, "* * * may, in listing property for taxes for any years thereafter, assess all back taxes due thereon according to the provisions of this statute." The Assessor has an express duty enjoined upon him in this respect as determined in Article 7193 and Article 7207 (the latter adopted in 1888) in dealing with taxes for prior years. (Reply Brief, Appendix, pp. 33; 34.)

The Trust was charged with notice of these Statutes, inclusive of the authority thus to be conferred upon the

Assessor.[8] The thing that was acquired was not the minerals themselves but those rights over the minerals which are respected by the State and are protected by the State. The duty to pay is a character of consideration for such rights—as to nonresidents, the only obligation is to pay taxes.

Thus, the Assessor here was authorized to back assess this property. He was statutory agent to do so. There is no contention that the valuation was excessive. There is no claim of excuse by inadvertence or want of knowledge since the Trust was informed that taxes were due. Both in respect of the properties in Texas and those owned elsewhere in the United States, the Trust simply failed to give them any attention either by rendering or by paying.

While the $2 valuation is nominal, it is the one set up by the Taxing Authorities for nonproducing minerals generally. It was the value placed on the property when it was rendered by the Trust. According to Mr. Wherry, the property had a value of $50 per acre. The real complaint is not in respect of the valuation or the duty to pay taxes, but in respect of the adequacy of notice of the suit.

Similar statutes to those in Texas have been adopted in numerous states. They are in keeping with the philosophy expressed by Justice Holmes in *Pullman Co. v. Knott*, 235 U.S. 23, wherein the Company, having failed to furnish information based upon which valuation could be fixed, was said to have permitted its right so to do to go by.

The provisions of the Statute dealing with defenses in tax suits, do not forbid proof of invalidity of the tax

[8] **North Laramie Land Co. v. Hoffman**, 268 U.S. 276.

assessment.[9] It has been held in Texas that the authority granted the Tax Assessor to render and value when the taxpayer fails or refuses to do so is proper.[10] Apparently this right of the Assessor to list and value is of ancient origin and has been recognized in several other states, inclusive of Florida[11], Louisiana[12], Maine[13], Massachusetts[14], and probably others.

We may say assuringly that a very large part of the real estate assessment in Texas are thus made by the assessor as unrendered.

IV.

We next deal with the sufficiency of notice of the suit.

A. As we read that opinion, this question is ruled by the opinion of this Court in *Ballard v. Hunter*, 204 U.S. 241, in two particulars.[15]

The Supreme Court of Texas is the final authority in respect of the interpretation and application of its Rules of Civil Procedure and of its Statutes.

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[9] **Town of Pleasanton v. Vance**, 277 S.W. 89; **Masterson v. Town of Hedley**, 265 S.W. 406.

[10] **Whelan v. State**, 282 S.W. 2d 378, 382, (Supreme Ct.).

[11] **Amos v. Jacksonville**, 81 So. 524.

[12] **Travelers Ins. Co. v. Board of Assessors**, 47 So. 489.

[13] **Powell v. City of Old Town**, 81 Atl. 1068.

[14] **Porter v. Norfolk Co.**, 5 Gray 365. See also cases cited, 84 C.J.S., p. 764, and **King v. Mullins**, 171 U.S. 404, dealing with laws of Kentucky.

[15] As stated at page 260: The assignment of error "Is based on the contention that the Supreme Court of the State erred in not deciding the plaintiffs in error were not given the notice required by the statutes of the State * * *. What the statutes required was for the Supreme Court to determine; whether, as determined, it constituted due process, is for us to decide." No attack is made on the constitutionality of the Rule in the case at bar.

As to the contention that a citation by personal service was in all events required, it will be noted that as to the nonresident defendants:

> "Not being defendants who were entitled to personal service, they cannot urge against the decree that they were not given personal service." (206 U.S. 265)

As stated by this Court in the case of *Leigh v. Green*, 193 U.S. 79, statutes providing for notice of tax suits must be read in light of the fact that the statutes are intended to reach those who are "so-minded" as to keep up with their taxes. See also *Longyear v. Toolan*, 209 U.S. 414, and *Huling v. Kaw RR Co.*, 130 U.S. 559, 564.

It is to be remembered also that, under the Constitution of Texas (Art. 8, Sec. 13) and Statute (Art. 7345b, Sec. 12) of Texas, there is a right of redemption for a period of two years after the recording of the deed in a tax sale. The recording of the deed gives a character of notice, at least under the philosophy of the law of Texas. The constitutional requirement of redemption was evidently adopted in view of the feeling that two years is a reasonable time within which one who presumably is keeping up with his property should become alerted to a tax judgment. In this case Petitioners had ten years prior to the tax sale and two years afterwards to give attention to their tax obligations of yearly rendition and payment.

B. If we be mistaken as to the sufficiency of our Reply in Paragraph A hereof, yet looking to the "practicalities and peculiarities of the case" as disclosed by the facts, there is, we submit, no want of Due Process on this question of notice.

The County Attorney did not have the same information as had Stovall with his information arising from the two letters which he wrote Dowd, attorney for Mrs. Cocklin, in 1949 and 1950. The County Attorney was imposed upon by not being furnished this information. It is suggested, however, that he was at fault in not learning the addresses of Van Sant (in two different States) and of Cocklin in St. Paul as disclosed by tax renditions 10 to 13 years old. This alleged fault is to be weighed in light of further facts. As this Court has pointed out, taxpayers who are neglectful of the duty to pay taxes ought not to rely upon their neglect as a basis for shifting an undue burden upon taxing authorities in seeking to locate them.

Summarized the facts are that the Trust had failed to record its instrument of creation in the records of Texas and had failed to record a conveyance from Van Sant to Cocklin made in 1941 wherein Cocklin became the owner of 600 of the 663 certificates of interest. Both Van Sant and Cocklin were dead, the latter having died in 1942. His widow still lived in St. Paul and was represented by Mr. Dowd as their attorney. In 1949 Dowd's attention was expressly called to the absence of recorded information with the request that this information be furnished. This letter also called attention to the probability of delinquent taxes. (See Appendix, p. 51, where this letter is quoted.) In 1949 the then spokesman for the Trust (in view of the death of four of the seven original Trustees and the unknown address of the fifth) was Beddall, who acted for the Trust in dealing with Wherry. His attention was directed to both the above facts. Nothing was done; not only so, but he testified, when asked whether the Trust

would have paid the taxes had he been notified of the suit:

> "I wouldn't say I would have paid them, and I wouldn't say I would not have paid them. * * * We were just waiting and holding for development." S.F. 122, line 22; S.F. 123, line 3.

The Trust, during Cocklin's and Van Sant's lifetime, knew of the existence of the duty to pay taxes. It developed on the trial that the tax receipts, the original of letters received, and copies of those sent by Cocklin were in his files. These showed that the Trust had reserved many thousands of acres of minerals (evidently based upon resale of lands after mortgage foreclosures through the companies owned by Van Sant) and that Cocklin held the view that the particular land would produce when properly tested.[16] Yet with this information no attempt after his death was made to render or pay taxes. Further, according to Beddall, the Trust had no telephone or other form of address at the time of the tax suit, maintained no office, had no money, and for years had conducted no business, had no meetings of its Trustees or Certificate Holders, had not rendered or paid taxes, either in Texas or elsewhere.

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[16] Petitioners produced from Cocklin's files (being also the Trust's files) tax receipts for 1936-40, and copies of letters to and from the Tax Collector re this Jackson County property written in 1936. Likewise, they offered the letters from Stovall to Dowd dated in 1949 and 1950 (1950 letter asking for a reply to the 1949 letter). They ought not to complain that they had no knowledge of the existence of the mineral interest, or of Cocklin's faith in its producing, or of the fact that taxes were to be rendered and paid. Note **Ontario Land Co. v. Yordy**, 212 U.S. 152, 159.

When the County Attorney was requested by the Assessor to institute the suit, he was informed by the data presented to him for suit that the Trust had no address. The County Attorney testified that he was desirous of locating the Trust. He says likewise he inquired of the Assessor (S.F. 465.) His first step was to write the Secretary of State of Minnesota, who advised that they knew nothing of the concern. He made inquiry in St. Paul of the Tax Collector but received no reply (S.F. 465.) The Trust Instrument was not only not recorded in Texas, but likewise was not recorded in Minnesota. If he had determined by looking at the tax records that a man named Cocklin was at one time connected with the matter and had caused the process to be sent to St. Paul with direction that Cocklin be contacted, no legal service could have been had upon his wife. Under the Declaration of Trust, the Trustees are given no express power to sue or be sued (Vol. 2, p. 117, Exh. 22 for Trust.) By indirection, however, it might have been learned through her that Beddall could be served. Whether tax officials, in light of inactivity and gross inattention of a taxpayer, as above detailed, should be required to take secondary steps looking toward service of process, may be doubted. Furthermore, it is highly speculative, as the Supreme Court of Texas pointed out, whether, had the notice been served, it would have yielded any payment to protect the property.

The inquiry arises whether there was a duty to look back 10 to 13 years, breach of which denies Due Process. This is to be weighed in light also of the fact that Rule 117 (a) (on the July previous to the filing of the suit in October) had been amended by the Supreme Court, upon the recommendation of a Committee of Members of the Bar of Texas appointed to that end by the

Court, limiting investigation back to 5 years, due to the undue burden placed on County Attorneys in looking back farther. (Reply, App. p. 51.) That Court presumably is familiar with the peculiar conditions prevailing in Texas. While this change in the Rules did not become effective until December 1, 1950, it was a fact before the County Attorney earlier as a member of the State Bar receiving the State Bar Journal in which the change had been published, to be weighed by him and now to be weighed by this Court in viewing this question of alleged vital breach affecting Due Process. The County Attorney cannot be charged with acting arbitrarily.

We respectfully submit that under the circumstances above detailed, it cannot be successfully asserted that the Supreme Court of Texas was in error in respecting the validity of the process here of that under the peculiar facts and the practical situation there was any want of Due Process.

In none of the more recent cases in this Court which are relied upon by Petitioners had the rights of third parties intervened.

In the *Covey* case, 351 U.S. 141, the only tax suit, the lady was served both by letter and by publication. This Court commented also on the fact that she was possessed of property, from which it would be inferred that she would normally have paid her taxes. This is to be contrasted with no such intent on the part of the Trust. Her mental condition was such that there was no notice in substance; and knowledge of this condition was such as to forbid the taxing authorities from relying upon notice. Attempt at redemption was immediate. That is the way we understand the facts.

In the case of *Walker v. City of Hutchinson*, 352 U.S. 112, Walker was in possession of the property, occupying it as his home, so we are informed.

As to the *Mullane* case, 339 U.S. 306, not only did the action in the tax suit here not seek to exempt plaintiff from an obligation, but it was docketed as one against the Mineral Holding Trust; and, in keeping with the want of any knowledge of the nature of the concern, it and the certificate holders were dealt with and cited in its various capacities as unknown shareholders or interest holders. (See f.n. 2.) While legal title may not be lost by abandonment in Texas, neglect to pay taxes over the period of time here should be held to constitute the character of abandonment mentioned in the authorities cited in the *Mullane* case.

Cases other than those involving taxes do not have the same historical background in respect of either what may be required by the State in its insistence upon payment of taxes due it or what may necessarily govern the nature of notice.

It is respectfully submitted that, however viewed, there is no want of Due Process in respect of the alleged inadequacy of notice. See Findings XXV, XXVI, XXVII, and XXVIII, Appendix to the Petition, pp. 67-72.

V.

On the assumption that Stovall and Appling were guilty of actionable fraud, it was unnecessary to set such a judgment aside in order that relief be had against them since they could be held constructively to hold title for the

Trust. But such would not afford relief against Alcoa, who was not shown to have knowledge of or to be chargeable with fraud. As to the leasehold estate claimed by Alcoa, the sole issue is between Wherry and Green on the one hand and Alcoa on the other. Thus, the sole issue in respect of Due Process now relied upon is one that must be set up by Wherry and Green. Hence the inquiry as to whether they may set it up.

We submit they are not in position to set up any right to relief based upon the doctrine of Due Process. Wherein was their property taken by the tax sale and wherein is it essential that they have relief to protect the Trust's right of relief?

Such rights of relief may be lost by waiver or by estoppel even by the party to the suit. And it appears to us it ought not to be permitted to be asserted when its assertion smacks of unfairness of the quality here; more particularly by third parties. To deny such relief to third parties in no wise interferes with the right of disposition of property, as Petitioners claim, for what is involved is a right of action. Courts are judges of the standing of litigants.[16a]

Wherry and Green used the judgment as a basis for bidding down the price paid for their lease and mineral interest. Why should they be granted a second use thereof?

They made only a partial disclosure to the Trust (having made any disclosure, a full disclosure was required), thereby purposely putting the Trust to a disadvantage and setting up an arrangement which, on its face, at least, it so appears,

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[16a] Wherry testified (S.F. 388) that he expressed no view to Beddall as to the validity of the judgment, simply stating: "I simply said I would take the property subject to the tax sale."

was intended to put Alcoa at a disadvantage. Wherry was emphatic in saying that he did not mention the Alcoa Company to the Trust. One apparent reason for this was that he did not want competition, and another reason, reasonably apparent, was that he did not want a disclosure to the Trust of the fact of the payment of a royalty in excess of a 1/8. Seeing also that Alcoa's lease terminated in 6 years absent drilling, he took a lease extending beyond this term to the end that he would be in position to "stand by" while the initial well be drilled on the tract in question by Alcoa to protect its lease. Standing by, he would have the benefit of paying for his part of the well if a producer and sharing no part of the loss if a non-producer.

The fact that he drove a hard bargain against the Trust without a full disclosure of the facts does not harm Alcoa, it is true. Yet such does not militate against the right of the Court to treat the conduct as of such quality as to forbid Wherry's right of action under the guise that property was taken without Due Process.[17] Wherry was an attorney of some years' standing. He expressed the view, while testifying, that the tax judgment was invalid or, at any rate, he would buy in opposition to any tax judgment as he had never seen one he could not set aside. He was engaged in speculating upon the outcome of his attack, and he occupies no position which, we submit, the Court should look upon with favor. In all events, this action having been filed in the nature of an equitable bill of review, the Courts were justified in

[17] The following cases support the view that a purchaser is not necessarily entitled to set up a want of Due Process in respect of a judgment against his grantor; **Estey & Camp v. Williams**, 133 S.W. 470 (Tex. CCA); **In re Hauer's Appeal**, 5 Watts S 475 (Pa.); **Bull v. Campbell**, 225 Fed. 923, 930 (CCA 8).

weighing the respective equities, and, so viewing, Wherry and Green were entitled to no relief. See the Trial Court's Supplemental Findings, Appendix to the Petition, p. XXXIII, p. 74 and XXXV, p. 75-6.

Another thing: In their Bill, while the Petitioners asserted for a multitude of reasons that there were no taxes due or, if due, there were penalties and interest due to which the Taxing Authorities were entitled, yet the State, as representative of the Taxing Agencies under the Statute, was not made a party to the Bill of Review. In Parapraph XXXI (p. 22 Tr.) of the Bill it is nevertheless alleged that the effect of the tax sale was to pay all taxes for years prior to 1950 and that a tender of the purchase money to Stovall and Appling alone was required. In Paragraph 12 of the Prayer (p. 27 Tr.) such relief is prayed for. One should not be permitted to affirm the tax judgment and sale in any particular and at the same time seek to repudiate it otherwise. See *Robb v. Voss*, 155 U.S. 13.

Conclusion

As pointed out by the Supreme Court in *Brown v. Bonougli*, 111 Tex. 275, 381, the Legislature of Texas has striven to give some degree of effectiveness to tax foreclosures. It was to this end that summary sales of realty were dispensed with and court foreclosures required. One of the most effective elements toward current tax payments is apprehension on the part of the taxpayer that payment will be forced by suit. To the extent that the judgment may not be relied upon by a purchaser, this threat is weakened. No reason thus exists why tax judgments should not have the same dignity as any other judgment of a court of general jurisdiction. Since 1897 (when Article 7320 was adopted as part of a general bill dealing

with the collection of delinquent taxes), numerous amendments have been made to the statutes but need not be traced here. These were matters traced in the Texas Courts. In 1937 another statute dealing with tax suit, comprehensive in quality, was adopted and afterwards amended in certain particulars in 1939, 1941, and 1947. This is the statute under which the suit here was instituted. Since the Petitioners did not list in their Appendix, we have done so that the Court may observe the existing law on the subject. (App. 35-51). (As pointed out, Subdivision 3(d), dealing with citation, has now been superseded by Rule 117(a)).

The only wrong charged against Alcoa, if there was a wrong, was in relying upon the validity of the judgment and the sale thereunder. They, upon inquiry, were informed that the concern was not to be found. (Finding XXXI).

Prayer

It is submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Of Counsel

Proof of Service

I, C. E. BRYSON, one of the attorneys for Respondents herein and a Member of the Bar of the Supreme Court of the United States, hereby certify that on the 31st day of July, 1957, I served copies of the foregoing Reply To Petition for Writ of Certiorari to the Supreme Court of Texas and Appendix on Petitioners, Wherry and Green, by delivering copies to Knox W. Gilmore and W. J. Barnes at 415 Texas National Bank Building and to Joyce Cox at 2828 Gulf Building, Houston 2, Texas; and by mailing copies to John E. Daubney, Pioneer Building, St. Paul, Minnesota; and John W. Stayton, Capital National Bank Building, Austin, Texas; all being attorneys for Petitioners; and likewise by mailing to the attorneys for Stovall and Appling; Frank Guittard, P. O. Box 586, Victoria, Texas, and S. G. Sample, P. O. Box 1806, Edna, Texas.

C. E. Bryson

C. E. BRYSON

TURN TO NEXT CARD

APPENDIX

CONSTITUTION OF TEXAS

ARTICLE VIII.

§11. *Place of Assessment; Value of Property not Rendered by Owner.*

All property, whether owned by persons or corporations shall be assessed for taxation, and the taxes paid in the county where situated, but the Legislature may, by a two-thirds vote, authorize the payment of taxes of non-residents of counties to be made at the office of the Comptroller of Public Accounts. And all lands and other property not rendered for taxation by the owner thereof shall be assessed at its fair value by the proper officer.

§13. *Sales of Lands and Other Property for Taxes; Redemption.*

Provision shall be made by the first Legislature for the speedy sale, without the necessity of a suit in Court, of a sufficient portion of all lands and other property for the taxes due thereon, and every year thereafter for the sale in like manner of all lands and other property upon which the taxes have not been paid; and the deed of conveyance to the purchaser for all lands and other property thus sold shall be held to vest a good and perfect title in the purchaser thereof, subject to be impeached only for actual fraud; provided, that the former owner shall within two years from date of the filing for record of the Purchaser's Deed have the right to redeem the land on the following basis:

(1) Within the first year of the redemption period upon the payment of the amount of money paid for the land, including One ($1.00) Dollar Tax Deed Recording Fee and all taxes, penalties, interest and costs paid plus not exceeding twenty-five (25%) percent of the aggregate total;

(2) Within the last year of the redemption period upon the payment of the amount of money paid for the land, including One ($1.00) Dollar Tax Deed Recording Fee and all taxes, penalties, interest and costs paid plus not exceeding fifty (50%) percent of the aggregate total. As amended Nov. 8, 1932. (Brought forward in Article 7330, R.S.)

§14. *Assessor and Collector of Taxes.*

Except as provided in Section 16 of this Article, there shall be elected by the qualified voters of each county, an Assessor and Collector of Taxes, who shall hold his office for four years and until his successor is elected and qualified; and such Assessor and Collector of Taxes shall perform all the duties with respect to assessing property for the purpose of taxation and of collecting taxes, as may be prescribed by the Legislature. As amended Nov. 8, 1932; Nov. 2, 1954.

§15. *Lien of Assessment; Seizure and Sale of Property.*

The annual assessment made upon landed property shall be a special lien thereon; and all property, both real and personal, belonging to any delinquent taxpayer shall be liable to seizure and sale for the payment of all the taxes and penalties due by such delinquent; and such property may be sold for the payment of the taxes and penalties

due by such delinquent, under such regulations as the Legislature may provide.

RULES OF CIVIL PROCEDURE

Rule 109. *Citation by Publication*

Where a party to a suit, his agent or attorney, shall make oath that the residence of any party defendant is unknown to affiant (and to such party where the affidavit is made by his agent or attorney) or that such defendant is a transient person, and that after due diligence such party and the affiant have been unable to locate the whereabouts of such defendant, or that such defendant is absent from or is a nonresident of the State, and that the party applying for the citation has attempted to obtain personal service of nonresident notice as provided for in Rule 108, but has been unable to do so, the clerk shall issue citation for such defendant for service by publication. In such cases it shall be the duty of the court trying the case to inquire into the sufficiency of the diligence exercised in attempting to ascertain the residence or whereabouts of the defendant or to obtain service of nonresident notice, as the case may be, before granting any judgment on such service. Provided, however, that where the affidavit shows that the defendant is not within the continental United States, and is not in the Armed Forces of the United States, it shall not be necessary for the party to show that the residence or whereabouts of the defendant is unknown or that an attempt has been made to procure service of nonresident notice. As amended by order of Oct. 10, 1945, effective Feb. 1, 1946.

Rule 117a. *Citation in Suits for Delinquent Ad Valorem Taxes*

(Same was amended under order dated July 17, 1950, to become effective December 1, 1950, only in one particular; namely, that where a record owner had rendered his property within five (5) years before the tax suit, there was a duty to seek personal service of citation.)

(The following comments published in the Texas Bar Journal—where notice normally is given by the Supreme Court of changes in its Rules—were made by the Supreme Court:

> This amendment was written and recommended by the Advisory Committee appointed by the Supreme Court in 1947, to draft a rule providing for the form of citation to be used in delinquent tax suits. The reason for recommending the amendment was that the present rule, in the opinion of the Committee, places an almost impossible burden on attorneys bringing delinquent tax suits of searching old tax records. The amendment limits this required search to five years before the suit is filed. The requirement of an affidavit showing diligent inqury, contained in the first sentence, is retained. 13 T.B.J. 423-424.)

(The language found in Rule 117a, second paragraph as shown in the Appendix to the Petition, dealing with attempted personal service; has been changed to read as follows:

> ". . . and provided further that where any record owner has rendered the property involved within five years before the tax suit is filed, citation on such record owner may not be had by publication or posting unless citation for personal service has been issued

as to such record owner, with a notation thereon setting forth the same address as is contained on the rendition sheet made within such five years, and the sheriff or other person to whom citation has been delivered makes his return thereon that he is unable to locate the defendant."

Article 2041a. *Suits against unknown owners or claimants of interest in land; citation by publication.*

Sec. 1. When land in this State or any interest of any kind in land has been or may hereafter be conveyed, or any lease or contract with reference to land made by written instrument (a) to any person or persons as trustee or trustees and in the conveyance or instrument constituting source of title or claim of title the names of the persons taking or holding the equitable or beneficial title are not disclosed and are unknown, or (b) to any association, joint stock company or partnership, in an association, company or firm name, without disclosing the names of the members, shareholders or partners or persons owning interests in such association, company or firm, and such association, joint stock company or partnership shall thereafter be dissolved and the names of the persons holding or acquiring title to such lands after dissolution are not disclosed in such instrument and are unknown; in each of such cases any person claiming ownership of or any interest in such lands or having a claim or cause of action against such unknown owners or claimants as such. The provisions hereof shall apply to conveyances made to all character and kinds of companies, associations and organizations, and in which conveyance the names and identity of the persons taking and holding the beneficial or equitable title are not disclosed and are un-

known; provided, however, that if the grantee in such conveyance is shown therein to be a corporation or if the grantee be known to be a corporation, in such event this Act shall not apply, but the rights of action shall be governed by Article 2040 of Revised Civil Statutes; but if the character of the organization as whether incorporated or incorporated is not shown in such conveyance and such facts are unknown, then suit brought under the provisions of this Act against the unknown owners or claimants of property under such conveyance shall be sufficient to give the Court jurisdiction over such unknown owners or claimants regardless of whether the named grantee is in fact a corporation or unincorporated. Acts 1931, 42nd Leg., p. 369, ch. 216.

TAX STATUTES

(Tex. Statutes, Volume 20)

Article 7146. *"Real Property"*

Real property for the purpose of taxation, shall be construed to include the land itself, whether laid out in town lots or otherwise, and all buildings, structures and improvements, or other fixtures of whatsoever kind thereon, and all the rights and privileges belonging or in any wise appertaining thereto, and all mines, minerals, quarries and fossils in and under the same. (1876).

Article 7152. *How Rendered*

All property shall be listed or rendered in the manner following:

(1) By the owner. Every person of full age and sound mind, being a resident of this State, shall list all of his real estate, moneys, credits, bonds or stock of joint stock

or other companies (when the property of such company is not assessed in this State), moneys loaned or invested, annuities, franchises, royalties, and all other property.

(2) As agent. He shall also list all lands or other real estate, moneys and other personal property invested, loaned or otherwise controlled by him as agent or attorney, or on account of any other person, company, or corporation, whatsoever, and all moneys deposited subject to his order, check, or drafts and credits due from or owing by any person, body corporate or politic.

* * *

(9) Co-partnership. The property of a firm or company, ~~by a partner~~ or agent thereof. (1909)

Article 7153. *Where Rendered*

All property, real and personal, except such as is required to be listed and assessed otherwise, shall be listed and assessed in the county where it is situated; and all personal property, subject to taxation and temporarily removed from the State or county, shall be listed and assessed in the county of the residence of the owner thereof, or in the county where the principal office of such owner is situated. (1897)

Article 7160. *Listing for Others*

Persons required to list property on behalf of others shall list it in the same manner in which they are required to list their own, but they shall list it separately from their own, specifying in each case the name of the person, estate, company or corporation to whom it belongs. (1876)

Article 7161. *Sworn List*

Each person required by law to list property shall make and sign a statement, verified by his oath, as required by law, of all property, both real and personal, in his possession, or under his control, and which he is required to list for taxation, either as owner or holder thereof, or as guardian, parent, husband, trustee, executor, administrator, receiver, accounting officer, partner, agent or factor. (1876, 1905)

Article 7171. *Assessments in Owner's Name*

All real property subject to taxation shall be assessed to the owners thereof in the manner herein provided; but no assessment of real property shall be considered illegal by reason of the same not being listed or assessed in the name of the owner or owners thereof. (1876)

Article 7172. *Lien for Taxes*

All taxes upon real property shall be a lien upon such property until the same shall have been paid. And should the assessor fail to assess any real estate for any one or more years, the lien shall be good for every year that he should fail to assess for; and he may, *in listing property for taxes any year thereafter, assess all the back taxes due thereon, according to the provisions of this title.* (1876)

Article 7189. *When Assessments Made*

Assessors of taxes shall, between the first day of January and the thirtieth day of April of each year, proceed to take a list of taxable property, real and personal, in his county and assess the value thereof in the manner following, to-wit: By calling upon the person, or by-

calling at the office, place of business or the residence of the person, and listing the property required by law in his name, and requiring such person to make a statement under said oath of such property in the form hereinafter prescribed. (1876)

Article 7193. *Duty in Such Cases*

In all cases of failure to obtain a statement of real and personal property from any cause, the assessor of taxes shall ascertain the amount and value of such property and assess the same as he believes to be the true and full value thereof; and *such assessment shall be as valid and binding as if such property had been rendered by the proper owner thereof.* (1876)

Article 7205. *Assessment of Property Not Rendered*

If the assessor of taxes discovers any real property in his county subject to taxation which has not been listed to him, he shall list and assess such property in the manner following, to-wit:

1. The name of the owner; if unknown, say "unknown." 2. Abstract number and number of certificate. 3. Number of the survey. 4. Name of the original grantee. 5. Number of acres. 6. The true and full value thereof. 7. The number of lot or lots. 8. The number of the block. 9. The true and full value thereof. 10. The name of the city or town, and give such other description of the lot or lots or parcels of land as may be necessary to better describe the same; and such assessment shall be as valid as if rendered by the owner thereof. (1876)

Article 7207. *Assessment of Real Property for Previous Years*

If the assessor of taxes shall discover in his county any real property which has not been assessed or rendered for taxation for any year since 1870, he shall list and assess the same for each year for which it has not been assessed, in the manner prescribed in the preceding article; and such *assessment shall be as valid and binding as though it had been rendered by the owner thereof,* but no such real property shall be assessed by the assessor unless he has ascertained by the certificate of the Comptroller the fact that the records of his office do not show that the property has been rendered or assessed for the year in which he assesses it. (Adopted 1888)

Article 7210. *Assessor to Follow Instructions*

Tax assessors in the execution of their duties shall use the forms and follow the instructions which the Comptroller shall from time to time prescribe, and furnished to them by the county judge in pursuance of law. (1876)

Article 7218. *To Submit Lists to Board*

The Assessor of taxes shall submit all the lists of property rendered to him prior to the first Monday in June to the board of equalization of his county on the first Monday in June or as soon thereafter as practicable, for their inspection, approval, correction or equalization. After said board shall have returned the corrected and approved lists of taxable property, the assessor of taxes shall proceed to assess all the unrendered property of his county as provided for in this title, and shall proceed to make out and prepare his roles or books of all the real and per-

sonal property listed to him, in the form and manner prescribed by the Comptroller. (1876)

We may safely say that a very large part of real estate assessment is thus made by the assessor as unrendered.

(This is the statute under which the tax suit was instituted. A portion of this statute dealing with the question of citation by publication was repealed so far as it conflicted with the Texas Rule of Civil Procedure 117a.)

Article 7345b. *Suits for Delinquent Taxes by Taxing Units*

"Taxing Units" Defined

Section 1. For all purposes of this Act, the term "taxing units," shall include the State of Texas or any town, city or county in said State, or any corporation or district organized under the laws of the State with authority to levy and collect taxas.

Impleading other taxing units having tax claims; service on State and other taxing units; waiver of service; notice of suit

Sec. 2. In any suit hereafter brought by or in behalf of any taxing unit as above defined, for delinquent ad valorem taxes levied against property by any such taxing unit, the plaintiff may implead as parties defendant any or all other taxing units having delinquent ad valorem tax claims against such property, or any part thereof, and it shall be the duty of each defendant taxing unit, upon being served with citation as provided by law to appear in said cause and file its claim for delinquent ad valorem taxes against such property, or any part thereof. It shall be sufficient service upon the State of Texas in any county

in such suit to serve citation upon the County Tax Collector charged with the duty of collecting such delinquent taxes due the State and county against such property and it shall be sufficient service upon any other taxing unit to serve citation upon the officer charged with the duty of collecting the taxes of such taxing unit or upon the Mayor, President, or Chairman or the governing body of such taxing unit, or upon the Secretary of such taxing unit. Any taxing unit having any claim for delinquent ad valorem taxes against such property may waive the issuance and service of citation upon it.

It shall be mandatory upon any such taxing unit so filing such suit or suits, in all cases where all other taxing units are not impleaded to notify all such taxing units not so impleaded of the filing of such suit or suits, such notice to be given by depositing in the United States mail a registered letter addressed to such taxing unit or units giving the name or names of the plaintiff and defendants, the Court where filed, and a short description of the property involved in said suit so that such taxing units not impleaded may have the opportunity to intervene as herein provided.

Parties; issuance and service of process

Sec. 3. The laws governing ordinary foreclosure suits in the District Courts of this State shall control the question of parties, issuance, and service of process and other proceedings in tax suits, save and except as herein otherwise provided. The following special provisions shall apply to and govern the question of parties and issuance and service of process in tax suits:

(a) When the names of the owner or owners of the property against which foreclosure of the tax lien is sought are unknown to the attorney filing the suit for the plaintiff taxing unit, such unknown owner or owners may be made parties and given notice under the designation "unknown owner or owners of the hereinafter described land"; provided, however, that record owners of the property or any interest therein, including record lien holders, shall not be included in the designation of "unknown owners"; and persons within a period of five (5) years next preceding the filing of the suit, shall not be included in the designation of "unknown owners." When the owner of the property is deceased, and the names of the heirs of such former owner are unknown to the attorney filing the suit for the plaintiff taxing unit, such unknown heirs may be made parties and given notice under the designation of "unknown heirs" of such deceased person, subject to the same provisions and restrictions as above set out with reference to making parties under the designation of "unknown owner or owners."

(b) Where any defendant in such suit is a resident of the State of Texas and his residence is known to the attorney filing said suit, process shall issue for service on such defendant and be served and returned as directed by Articles 2021 to 2034, inclusive, of the 1925 Revised Civil Statutes of the State of Texas. Provided, however, that a statement of the nature of the cause of action conforming to the requirement for notices by publication as hereinafter set forth in paragraph (d) below shall be sufficient in such citation, when required.

(c) Where any defendant in such suit is absent from the State or is a nonresident of the State; it shall be suffi-

cient to serve said defendant with notice accompanied by a certified copy of plaintiff's petition as provided in Article 2037 of the 1925 Revised Civil Statutes of the State of Texas, and it shall be sufficient to serve such notice in the manner provided in Article 2038 of the 1925 Revised Civil Statutes of the State of Texas, or in the alternative, service may be had on such defendant by publication as provided in Section 3(d) hereof.

(d) Where any defendant in such suit is a nonresident of the State, where the names of the owner or owners of said property are unknown to the attorney filing the suit for the plaintiff taxing unit, where the residence of any defendant is unknown to such attorney, and where the names of the defendant heirs of any deceased person are unknown to such attorney, and such facts are recited in the petition, service of notice by publication is hereby authorized in each and all of such cases, and all defendants of classes enumerated just above may be joined in one notice; and where service is had by publication, such notice shall be directed to the defendants by name, or by designation as hereinabove provided, and shall be sufficient if they contain the number and style of the case, the names of all parties plaintiff, intervenors and defendants, the Court in which the suit is pending and when to appear and defend the suit, which shall be the first day of the next term of the Court in which the suit is filed; and, as a statement of the nature of the suit, such notices shall show the amount of the taxes alleged to be due each plaintiff and intervenor, exclusive of interest, penalties, and costs, and shall recite that all interest, penalties, and costs allowed by law are included in the suit, a brief general description of the property, and shall also contain, in substance, a recita-

tion that each party to such suit shall take notice of, and plead and answer to, all claims and pleadings then on file or thereafter filed in said cause by all other parties therein. Such notices shall be published in some newspaper published in the county in which the property is located one time a week for two (2) consecutive weeks, the first publication to be not less than fourteen (14) days prior to the first day of the term of Court to which returnable; and the affidavit of the editor or publisher of the newspaper giving the dates of publication, together with a printed copy of the notice as published, attached to such notice, shall constitute sufficient proof of due publication when returned and filed in Court. If there is no newspaper published in the county, then said publication may be made in a newspaper in an adjoining county. A maximum fee of Two and One-half (2½) Cents per line (6 words to count for a line) for each insertion may be taxed for publishing said notice. If the publication of such notice cannot be had for such fee, then service of the notice herein provided may be made by posting a copy at the Courthouse door of the county in which the suit is pending, such notice to be posted at least fourteen (14) days prior to the first day of the term of Court to which it is returnable. When notice is given as herein provided it shall be sufficient, and no other form of citation or notice shall be necessary on such defendants.

(e) Any process authorized by this Act may issue jointly in behalf of all taxing units who are plaintiff and/or intervenors in any suit. After citation and/or notice has been given on behalf of any plaintiff and/or intervenor taxing units, the Court shall have jurisdiction to hear and determine the tax claims of all taxing units who are parties

plaintiff, intervenor or defendant at the time such process is issued; and any taxing unit that has been made a party defendant to such suit may by answer or intervention set up and have determined its tax claims without the necessity of further citation or notice to any parties to such suit.

Pleading and answering to claims filed

Sec. 4. Each party to such suit shall take notice of, and plead and answer to, all claims and pleadings then on file or thereafter filed in said cause by all other parties therein, and the citation upon each defendant shall so recite.

Proof and finding of reasonable and fair value; "adjudged value," defined; burden of proof

Sec. 5. Upon the trial of said cause the Court shall hear evidence upon the reasonable fair value of the property, and shall incorporate in its judgment a finding of the reasonable fair value thereof, in bulk or in parcels, either or both, as the Court may deem proper, which reasonable fair value so found by the Court is hereafter sometimes styled "adjudged value," which "adjudged value" shall be the value as of the date of the trial and shall not necessarily be the value at the time the assessment of the taxes was made; provided, that the burden of proof shall be on the owner or owners of such property in establishing the "fair value" or adjudged value as provided in this section.

Costs and expenses; approval by court

Sec. 6. All court costs, including costs of serving process, in any suit hereafter brought by or in behalf of any taxing units for delinquent taxes in which suits all other taxing units having a delinquent tax claim against such

property of any part thereof, have been impleaded, together with all expenses of foreclosure sale and such reasonable attorney's fees as may be incurred by the interpleaded or intervening taxing units, not exceeding ten per cent (10%) of the amount sued for, such attorney's fee to be subject to the approval of the court together with such reasonable expenses as the taxing units may incur in procuring data and information as to the name, identity and location of necessary parties and in procuring necessary legal descriptions of the property, shall be chargeable as court costs.

Order of sale on foreclosure; sale

Sec. 7. In the case of foreclosure, an order of sale shall issue, and, except as herein otherwise provided, the land shall be sold thereunder as in other cases of foreclosure of tax liens.

Sale for less than adjudged value or aggregate of judgments in suit to party other than taxing unit prohibited; distribution of proceeds

Sec. 8. No property sold for taxes under decree in such suit shall be sold to the owner of said property, directly or indirectly, or to anyone having an interest therein, or to any party other than a taxing unit which is a party to the suit, for less than the amount of the adjudged value aforesaid of said property or the aggregate amount of the judgments against the property in said suit, whichever is lower, and the net proceeds of any sale of such property made under decree of court in said suit to any party other than any such taxing unit shall belong and be distributed to all taxing units which are parties to the suit which by

the judgment in said suit have been found to have tax liens against such property, pro rata and in proportion to the amounts of their respective tax liens as established in said judgment, but any excess in the proceeds of sale over and above the amount necessary to defray the costs of suit and sale and other expenses hereinabove made chargeable against such proceeds, and to fully discharge the judgments against said property, shall be paid to the parties legally entitled to such excess.

Purchasing taxing unit to hold property for itself and other taxing units adjudged to have liens; sale by purchasing taxing unit; proceeds; failure to sell within six months after redemption period expires

Sec. 9. If the property be sold to any taxing unit which is a party to the judgment under decree of Court in said suit, the title to said property shall be bid in and held by the taxing unit purchasing same for the use and benefit of itself and all other taxing units which are parties to the suit and which have been adjudged in said suit to have tax liens against such property, pro rata and in proportion to the amount of the tax liens in favor of said respective taxing units as established by the judgment in said suit, and costs and expenses shall not be payable until sale by such taxing unit so purchasing same. The taxing unit may sell and convey said property so purchased by it, or which has heretofore been purchased in the name of any officer thereof, at any time in any manner determined to be most advantageous to said taxing unit or units, either at public or private sale, subject to any then existing right of redemption; and the purchaser of the property at any such sale shall receive all of the right, title and

interest in said property as was acquired and is then held by said taxing unit under such tax foreclosure sale to it; but such property shall not be sold by the taxing unit purchasing the same, at private sale, for less than the adjudged value thereof, if any, as established in the tax judgment; or the total amount for which such judgment was rendered against the property in said suit, whichever is lower, without the written consent of all taxing units which in said judgment shall have been found to have tax liens against said property. All such consents shall be evidenced by the joinder in the conveyance by the consenting taxing units, acting by the officers herein authorized to give such consents. Consent to such sales in behalf of the State of Texas may be given by the County Tax Collector of the county in which the property is located; and consents on behalf of other taxing units may be given by the presiding officers of their governing bodies. Deeds executed hereunder by taxing units shall be executed in their behalf by the presiding officer of their governing body and whose authority to so act in any given case shall be prima facie presumed. When such property is so sold at public or private sale, the proceeds thereof shall be received by or paid over to the taxing unit which purchased said property at the tax foreclosure sale, for the account of itself and all other taxing units adjudged to have a tax lien against such property, and all taxing units so receiving said proceeds shall first pay out of the same all costs and expenses of Court and of sale, and distribute the remainder among all taxing units for which purchasing taxing unit purchased and held said property, pro rata and in proportion to the amounts of their tax liens against said property as established in said judgment. Public sales hereinabove provided for may either be made by the Sheriff, at the request of

the taxing unit purchasing the property at the tax foreclosure sale, or by any Commissioner appointed by such taxing unit by resolution of its governing body. If the State of Texas is the taxing unit which purchased said property at the tax foreclosure sale, the Commissioners Court of the county in which the property is located shall have authority to act for the State of Texas in making private sales and conveyances of said property, as herein provided, or in requesting the Sheriff, or in appointing a Commissioner, to make public sale thereof, and in receiving and distributing the proceeds of such sales; and all sales and conveyances made in behalf of the State of Texas by the Commissioners Court, or made by the Sheriff or any Commissioner appointed by the Commissioners Court, under the provisions hereof, shall operate to transfer to the purchaser at such sale all right, title and interest acquired or held by the State of Texas as purchaser at the tax foreclosure sale. Any taxing unit, Sheriff, or Commissioner appointed by a taxing unit, making any sale under provisions hereof shall execute and deliver to the purchaser at such sale a deed of conveyance, conveying all right, title and interest of all the taxing units interested in the tax foreclosure judgment in and to the property so sold; provided, if the period for the redemption of said property from said tax foreclosure sale has not expired at the time of said sale, said conveyance shall be made expressly subject to the right of redemption provided in Section 12 of said Act.

Provided, however, that the methods of sale above set out shall not be exclusive and that if sale has not been made by, or at the instance of, the purchasing taxing unit within six (6) months after the redemption period has expired, any taxing unit which has obtained judgment in

said suit may force the sale of said property by the Sheriff by written request to the Sheriff, and in the event such written request is so made to the Sheriff it shall be his duty to sell said property at public sale as hereinafter provided. All public sales provided for in this Section shall be made in the manner prescribed for the sale of real estate under execution. The notice of the sale shall contain a legal description of the property to be sold, the number and style of the suit under which same was sold at tax foreclosure sale and the date of said tax foreclosure sale; and the Sheriff or other officer making such sale is hereby authorized, and it is hereby made his duty, to reject any and all bids for said land when in his judgment the amount bid is insufficient or inadequate, and in the event said bid or bids are rejected, the land shall be readvertised and offered for sale as herein provided; but the acceptance by the Sheriff or other officer authorized to make such sale of a bid for said land shall be conclusive and binding on the question of the sufficiency of the bid, and no action shall be sustained in any Court of this State to set aside said sale on the grounds of the inadequacy of the amount bid and accepted. Nothing herein shall be construed as prohibiting any taxing unit participating in said judgment from instituting action to set aside the said sale on the grounds of fraud or collusion between the officer making the sale and the purchaser, provided that such action be brought within two (2) years after such sale is made, and not afterward. The Sheriff or other officer making any such sale shall receive and pay over the proceeds thereof as hereinabove provided, and the same shall be distributed as herein provided.

All sales and conveyances heretofore made by taxing units, or officers thereof, of property purchased by them, or in the name of any officer thereof, of property purchased by them, or in the name of any officer thereof, at tax foreclosure sales, for the benefit of themselves and all other taxing units interested in the tax judgment, and all sales heretofore made by the Commissioners Courts, or the Attorney General joined by the County Tax Collector, of property purchased by the State of Texas at tax foreclosure sales for the benefit of itself and other taxing units, are hereby in all things confirmed and validated; provided that this validating provision shall in no way apply to or validate any such sale the validity of which is challenged in any now pending litigation; nor shall the same apply to or validate any such sale, in cases where the Sheriff upon written request of any taxing unit, has thereafter made sale of the same property at public outcry and all such so made by the Sheriff as provided in Section 9 of said Act prior to the taking effect of this Amendment, and all such sales so made by the Sheriff are hereby in all things confirmed and validated.

No action attacking the validity of any resale of property purchased by a taxing unit at a tax foreclosure sale, or any of said sale hereafter made in accordance with, or purporting to be made in accordance with, this Section shall be commenced after the expiration of one (1) year from the date of such sale.

Title of Purchaser

Sec. 10. The purchaser of property sold for taxes in such foreclosure suit shall take title free and clear of all liens and claims for ad valorem taxes against such property

delinquent at the time of judgment in said suit to any taxing unit which was a party to said suit, or which had been served with citation in said suit as required by this Act. Provided, the term "all liens and claims for ad valorem taxes" shall never be construed to include assessments for maintenance and operation purposes on a pro rata per acre basis against irrigable lands authorized by law to be made by water improvement districts, or water control and improvement districts, and no judgment foreclosing such lines and claims for ad valorem taxes shall ever prejudice the collection of said assessments or the liens securing same.

Suits entitled to Precedence

Sec. 11. Suits for delinquent taxes shall have precedence and priority in the District Court of this State, and in the Appellate Courts thereof.

Judgment; redemption, right to

Sec. 12. In all suits heretofore or hereafter filed to collect delinquent taxes against property, judgment in said suit shall provide for the issuance of writ of possession within twenty (20) days after the period of redemption shall have expired to the purchaser at foreclosure sale or its or his assigns; but whenever land is sold under judgment in such suit for taxes, the owner of such property, or anyone having an interest therein, or their heirs, assigns or legal representatives, may, within two (2) years from the date of the filing for record of the purchaser's deed and not thereafter, have the right to redeem said property from such purchaser on the following basis, to-wit:

(1) Within the first year of the redemption period, upon the payment of the amount of the bid for the property by the purchaser at such sale, including a One Dollar ($1) tax deed recording fee and all taxes, penalties, interest and costs thereafter paid thereon, plus twenty-five per cent (25%) of the aggregate total.

(2) Within the last year of the redemption period, upon the payment of the amount bid for the property at such sale, including a One Dollar ($1) tax deed recording fee and all taxes, penalties, interest and costs thereafter paid thereon, plus fifty per cent (50%) of the aggregate total; and no further or additional amount than herein specified shall be required to be paid to effect any such redemption.

In addition to redeeming direct from the purchaser, as aforesaid, redemption may also be made upon the basis hereinabove defined as provided in Articles 7284 and 7285, of the Revised Civil Statutes of Texas of 1925. The term "purchaser" as used in this Section shall include any taxing unit purchasing property at tax foreclosure sale.

Distribution of redemption money

Sec. 12-a. In all cases in which property has been redeemed from a taxing unit, as provided in Section 12 of this Act, while said property is still held by such taxing unit, the taxing unit to whom the redemption money is paid shall distribute and apply said money in the same manner as provided in Section 9 of this Act for the application and distribution of the proceeds of the resale of land; but if the land so redeemed from a taxing unit has been resold during the period of redemption, the redemption money shall be distributed pro tanto by the taxing unit receiving the same, as follows:

(a) If the redemption occurs within one (1) year after the date of the resale of said land, the purchaser at such resale shall receive, out of the redemption money, the amount paid by him for the property at such resale, plus twenty-five per cent (25%) of such amount; or

(b) If said redemption occurs more than one (1) year after the resale of such land, the purchaser at such resale shall receive, out of the redemption money, the amount paid by him for the property at such resale, plus fifty per cent (50%) of such amount; and

(c) The remainder of such redemption money, if any, after payment to the purchaser at the resale as herein provided shall be distributed, pro rata, to the taxing units adjudged in the tax foreclosure judgment to have a tax lien against the property, in the proportions of the amounts for which such liens were established.

Provisions of Act cumulative; effect of conflict with other acts

Sec. 13. The provisions of this Act shall be cumulative of and in addition to all other rights and remedies to which any taxing unit may be entitled, but as to any proceeding brought under this Act, if any part or portion of this Act be in conflict with any part or portion of any law of the State, the terms and provisions of this Act shall govern as to such proceeding. The provisions of Chapter 10, Title 122 of the Revised Civil Statutes of 1925 shall govern suits brought under this Act except as herein provided.

Partition of lands involved in tax suits

Sec. 15. Where suits are filed for delinquent taxes under the provisions of this Act, and the land is owned undivided

by two (2) or more persons, any one or more persons owning an undivided interest in such land, may have the same partitioned as now provided by law for the partition of real estate by the district Courts of this State. When said land has been partitioned and set aside in severalty to the respective owners thereof, the taxes, penalties, interest, and costs shall be apportioned and taxed against the respective owners thereof in proportion to their respective interests in the whole, and upon the payment of taxes, penalties, interest, and costs so apportioned and taxed against such owner, and the land so set aside and partitioned to such owner in severalty, the same shall constitute full and final payment of all taxes, penalties, interest, and costs owing by such owner involved in such suit, and the land so partitioned shall thereafter be free from any further claim or lien for the taxes involved in said suit against said owner.

Provided, however, any owner or owners of a portion thereof so set aside and apportioned to him in such partition proceeding as herein provided shall or refuse to pay the taxes, penalties, interest, and costs taxed and apportioned against him and his interest, such suit shall proceed to a conclusion in accordance with all other provisions of this Act as to such owner and land, and the Court shall render judgment accordingly, omitting from said judgment such owner or owners and the land apportioned to such owner or owners in said partition proceeding as the taxes, penalties, interest, and costs have been paid as herein provided.

In addition to the fees now allowed by law to the county, district, or other attorney authorized by law to represent the State and county in suits provided by this Act for delinquent taxes, the judgment of the district Court trying the case shall allow such attorney an additional fee for

services occasioned by a partition of said land, where a partition is sought, a sum not to exceed Five Dollars ($5) per acre for each separate tract so partitioned, the same to be taxed as part of the costs against the respective owners in proportion to their interest in the whole, the same to constitute a lien against said land until paid, and when paid shall be paid over by the tax collector to the county, district, or other attorney entitled under the law to receive the same.

"Owner" as herein used shall mean any person, male or female, firm or corporation owning an interest in said land.

July 2, 1949

Mr. Fred L. Doud
1381 Marshall Street
St. Paul, Minnesota

Dear Mr. Doud:

Re: Stovall and Appling Fee,
Land File #39, 640 Ac.,
Being Sec. #35, Koch Subdv.,
Jackson County, Texas

Mr. P. C. Owen of El Campo, who called on you at our (suggestion), suggests that we write or advise with you with reference to a mineral reservation in above land many years ago, now in name of Mineral Holding Trust according to the records of Jackson County, Texas, where the land in question is located. Said mineral reservation contained a deed from Grant Van Zant to A. E. Johns et al. March 5th, 1920; Mr. Grant Van Zandt subsequently quit claiming same to Mineral Holding Trust. Neither Van

Zant nor Mineral Holding Trust having ever paid any taxes thereon.

Mr. Appling and I desire to get this cloud on our land title removed by quit claim deed or deeds, and we are willing to pay $500.00 cash for quit claims from whoever owns or has legal right to make us such quit claim deeds. We would very much desire this method than by legal procedure, and would like to clear our title while we are living,—we are getting along in years,—I am 68.

Mr. Owen speaks of you in the highest terms and recommends that we made arrangements with you to handle the securing of quit claims from the proper parties; if you will kindly accept the employment we are willing to pay you $150.00 service fee and your incidental expenses, for securing and delivering to us the quit claims together with proof by Affidavits (or other authentic proof) that the ones making the quit claims are the owners of the Mineral Holding Trust. Mr. Owen says he thinks a Mrs. Concklin is one of the main owners in said Trust, but he is not at all clear as to who or how many are in the Trust but thinks you will be able to acquire this information.

Our attorney is Mr. D. M. Duson of El Campo, Texas, to whom we are mailing a copy of this letter, and needless to say that both Mr. Duson and I will fully cooperate with you in every way possible incidental to handling the matter successfully. On receipt of a letter from you that you will undertake to handle this matter for us we will mail you $50.00 check for retainer and expenses. We think it might be a good idea to secure the original authentic copy of instrument creating the Mineral Hold-

ing Trust, as both Mr. Duson and I are completely in the dark on this point.

Awaiting reply; remain, Very truly yours,

signed Guy F. Stovall

HGD c/cy to Mr. Duson

CONSTITUTION AND STATUTES DEALING WITH RIGHT OF PURCHASER TO RELY UPON JUDGMENT

Art. 3323. 3245, 1879, 1826 *Valid title through executor*

When an executor or administrator, legally qualified as such has performed any acts as such executor or administrator in conformity with his authority and law, such acts shall continue to be valid to all intents and purposes, so far as regards the rights of innocent purchasers of any of the property of the estate from such executor or administrator, for a valuable consideration, in good faith, and without notice of any illegality in the title to the same, notwithstanding such acts or the authority under which they were performed may afterward be set aside, annulled and declared invalid.

Art. 3818. 3768, 2378, 2318 *Purchaser deemed innocent*

A purchaser at a sale under execution shall be deemed to be an innocent purchaser without notice in all cases where he would be deemed to be such had the sale been made voluntarily by the defendant in person.

Article 7330, dealing with tax judgments, is found in the Petition, p. 45.

The constitutional provision, Article VIII, Sec. 13, is found at page 25 of the Reply Appendix.